89-578

No.

Supreme Court, U.S.
FILED
OCT 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOAN LYNN CAIN,

Petitioner,

vs.

BRUCE E. LARSON, Police Chief of the Village of Herscher, Illinois, Police Department, DANIEL SUESS, Mayor of the Village of Herscher, Illinois, and President of the Village of Herscher, Illinois, Police Board, ARTHUR BROCKSMITH, EARL DATWEILER, JAMES FELLER, STEVE JACOB, MERLE HENDRIX, and ROBERT MITCHELL, Individually and as Trustees of the Village of Herscher, Illinois, Board,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STANLEY H. JAKALA
3219 South Maple Avenue
Berwyn, Illinois 60402
(312) 788-5733

Attorney for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED FOR REVIEW

Does the Uniform Peace Officers' Disciplinary Act, Ill. Rev. Stat., 1983, Ch. 85, Secs. 2551, 2560, 2561, and 2563, create substantive property rights in interrogation of tenured and non-tenured Illinois police officers, even though the Act does not specify that officers may be disciplined only if they engage in certain kinds of conduct?

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OPINIONS BELOW

On November 7, 1988, the United States District Court for the Northern District of Illinois, Eastern Division, granted the respondents' motion to dismiss the petitioner's amended complaint that the Uniform Peace Officers' Disciplinary Act, Ill. Rev. Stat., 1983, Ch. 85, Secs. 2551, *et*

seq., did not create substantive property rights. (The opinion of the United States District Court of November 7, 1988, is reprinted herein as Appendix B.)

On July 7, 1989, the United States Court of Appeals, for the Seventh Circuit, affirmed the decision of the United States District Court for the Northern District of Illinois, Eastern Division, that the Uniform Peace Officers' Disciplinary Act did not create substantive property rights except for Ill. Rev. Stat., 1983, Ch. 85, Sec. 2568, which section was not invoked by the petitioner in that it did not apply to the petitioner. (The United States Court of Appeals decision of July 7, 1989, is reprinted herein as Appendix A.)

JURISDICTION

1. The federal question that the petitioner was deprived of substantive property rights in violation of the Fourteenth Amendment of the United States Constitution via the Uniform Peace Officers' Disciplinary Act, Ill. Rev. Stat., 1983, Ch. 85, Secs. 2551, *et seq.*, was raised in the petitioner's Complaint for Declaratory Judgment filed in the United States District Court for the Northern District of Illinois, Eastern Division, in conjunction with 42 U.S.C. Sec. 1983; further, the very issue was raised in the appeal to the United States Court of Appeals, for the Seventh Circuit.

2. The petition for writ of certiorari was filed within ninety days after the entry of the Judgment by the United States Court of Appeals for the Seventh Circuit on July 7, 1989.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Fourteenth Amendment: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Sec. 1983: Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner was a police officer for the Village of Herscher, Illinois. Previously, petitioner had been employed as a police officer with the Village of Steger, Illinois. During her tenure with the Village of Steger Police Department, petitioner was repeatedly harassed by a Daniel D. Diamond. Diamond had threatened petitioner's life during a telephone call, and on numerous occasions had also harassed petitioner over the telephone, through the mail and during his appearances at the Village of Steger Police Department and petitioner's residence. Petitioner resigned from the Village of Steger Police Department, in part, to prevent Diamond from contacting her.

Petitioner was then hired by the Village of Herscher, Illinois as a police sergeant. On March 13, 1987, Diamond was arrested by the Kankakee County Sheriff's Department for public intoxication. Petitioner was involved in that arrest and was working for the Village of Herscher Police Department ("police department") at the time.

Following the arrest, petitioner was questioned by respondent Bruce E. Larson ("Larson"), Police Chief of the Village of Herscher, regarding the arrest. Larson conducted interrogations of the petitioner on each day from March 14-21, 1987, and conducted his final interrogation on March 23, 1987. Larson did not advise petitioner that she was under investigation by him for the purpose of gathering evidence of misconduct which could potentially serve as the basis for petitioner's removal, discharge or suspension in excess of three days from the police department. Petitioner was not represented by counsel during the interrogations, nor was she advised she could be represented by counsel if she so desired. Petitioner was not

informed that Larson was conducting the investigation to determine the extent of her participation in Diamond's arrest, nor was she advised in writing that the admissions she made during the course of the interrogation could be used as evidence against her in any following disciplinary proceedings.

The Village of Herscher commenced disciplinary proceedings against petitioner on April 2, 1987. The first count of the complaint charged petitioner with official misconduct, battery, disorderly conduct, and assault or intimidation. The second count alleged unethical conduct as a police officer because petitioner failed to substantiate threatening phone calls and letters from Diamond. The final count alleged poor work quality and substandard work habits. (This count was eventually dismissed at the hearing.)

Before the hearing, petitioner requested that Larson turn over the correspondence petitioner received from Diamond to present as evidence in the hearing. Larson failed to return Diamond's correspondence to petitioner. Additionally, Larson failed to conduct a thorough investigation prior to the hearing which would have exonerated petitioner from the unethical conduct charges filed against petitioner.

During petitioner's hearing, reports made by deputy sheriffs of Kankakee were read into the record over the objection of petitioner's counsel that the reports were hearsay. The hearing was conducted by the respondent trustees of the Village of Herscher.

Petitioner resigned during the course of her hearing, having become physically and mentally distraught as a result of the respondents' conduct in falsifying the charges against petitioner and denying petitioner her due process rights.

REASONS FOR GRANTING THE WRIT

THE UNIFORM PEACE OFFICERS' DISCIPLINARY ACT, ILL. REV. STAT., 1983, CH. 85, SECS. 2555, 2560, 2561, and 2563, CREATES SUBSTANTIVE PROPERTY RIGHTS IN INTERROGATION OF TENURED AND NON-TENURED ILLINOIS POLICE OFFICERS EVEN THOUGH THE ACT DOES NOT SPECIFY THAT OFFICERS MAY BE DISCIPLINED ONLY IF THEY ENGAGE IN CERTAIN KINDS OF CONDUCT.

For purposes of clarity, Sections 2555, 2560, 2561, and 2563 of the Uniform Peace Officers' Disciplinary Act, Ill. Rev. Stat., 1983, Ch. 85, are stated herein pertaining to the analysis that will be provided hereinafter.

> ¶ 2555. . . . No officer shall be subjected to interrogation without first being informed in writing of the nature of the investigation. If an administrative proceeding is instituted, the officer shall be informed beforehand of the names of all complainants. The information shall be sufficient as to reasonably apprise the officer of the nature of the investigation.
>
> ¶ 2560. . . . A complete record of any interrogation shall be made, and a complete transcript or copy shall be made available to the officer under investigation without charge and without undue delay.
>
> ¶ 2561. . . . No officer shall be interrogated without first being advised in writing that admissions made in the course of the interrogation may be used as evidence of misconduct or as the basis for charges seeking suspension, removal, or discharge; and without first being advised in writing that he or she has the right to counsel of his or her choosing who may be present to advise him or her at any stage of any interrogation.

> ¶ 2563. . . . Admissions or confessions obtained during the course of any interrogation not conducted in accordance with this Act may not be utilized in any subsequent disciplinary proceeding against the officer.

Determining that the Uniform Peace Officers' Disciplinary Act, specifically Secs. 2555, 2560, 2561, and 2563, did not create substantive property rights, but rather procedural rights, the United States Court of Appeals reached this determination because the Act did not specify that officers may be disciplined only if they engage in certain kinds of conduct.

In its opinion, at page 6, the United States Court of Appeals concluded that procedural rather than property rights were created by the Uniform Peace Officers' Disciplinary Act, when it distinguished *Fleury v. Clayton*, 847 F.2d 1229 (7th Cir. 1988), upon which the petitioner relies, to substantiate her position that substantive property rights are created by the Uniform Peace Officers' Disciplinary Act, also known as the Illinois Police Officers' Bill of Rights.

The Seventh Circuit, in deciding *Fleury v. Clayton*, 847 F.2d 1229 (7th Cir. 1988), recognized that there was a property interest in a blemish-free license to practice medicine, *Fleury* at 1232, because, in *Fleury*, the Illinois statute prohibits the Illinois Department of Registration and Education from filing charges and imposing sanctions on licensed doctors unless the Department abides by criteria as set forth in the statute.

Among the criteria specified as grounds for imposing sanctions upon licensed doctors are conviction of a felony in Illinois or any other state, gross or repeated malpractice, engaging in unethical conduct, drug addiction, abandoning a patient, overcharging fees, and willfully making false records or reports.

By analogy, the petitioner argues, herein, that neither the respondent chief of police, Larson, nor the respondent board of trustees of the Village of Herscher can formulate charges of misconduct against the petitioner based on admissions derived during her interrogations unless the interrogations proceeded in accordance with the substantive criteria found in the provisions of Uniform Peace Officers' Disciplinary Act. The provisions of the Act, Secs. 2555, 2560, 2561, and 2563, govern the conduct of petitioner's superior officers (e.g., Larson, Chief of Police of the Village of Herscher) during interrogations to gather evidence of misconduct to serve as the basis of filing charges seeking removal, discharge or a suspension in excess of three days.

To hold, as the United States Court of Appeals for the Seventh Circuit does, that since the Act does not specify grounds for which a police officer may be disciplined, that results in procedural rights rather than substantive rights, cannot be justified in that it would be impossible to specify each and every action for which an officer can be suspended or terminated from the standpoint of statutory, rule, regulation, and policy violations.

For purposes of emphasis, the Illinois Police Officers' Disciplinary Act (the "Act") applies to the following factual situations wherein disciplinary actions were instituted even though those are not specified in the Act as grounds for invoking its application:

1. *Sutton v. Civil Service Commission*, 91 Ill.2d 404, 438 N.E.2d 147 (1982), prison guard admittedly asked inmate "what it would take to get someone killed off in prison";

2. *Walsh v. Board of Fire and Police Commissioners*, 96 Ill.2d 101, 449 N.E.2d 115 (1983), police

officer threatened suicide and discharged gun injuring fellow officer;

3. *DeGrazio v. Civil Service Commission*, 31 Ill.2d 482, 202 N.E.2d 522 (1964), police officer flagrantly traveled throughout Europe with organized crime figure;

4. *Hruby v. Board of Fire and Police Commissioners*, 22 Ill.App.3d 445, 318 N.E.2d 132 (1974), police officer committed theft;

5. *Kreiser v. Police Board of City of Chicago*, 40 Ill.App.3d 436, 352 N.E.2d 389 (1976), *aff'd* 69 Ill.2d 27, 370 N.E.2d 511 (1977), officer made false oral statement to superior, left station without properly logging out, failed to obey order and operated vehicle not properly licensed;

6. *Collins v. Board of Fire and Police Commissioners*, 84 Ill.App.3d 516, 405 N.E.2d 877 (1980), officer forged a signature on official arrest card and failed to follow official evidence handling procedures;

7. *Humbles v. Board of Fire and Police Commissioners*, 53 Ill.App.3d 731, 368 N.E.2d 1049 (1977), officer lied to superior officer;

8. *Batley v. Kendall County Sheriff's Department Merit Commission*, 99 Ill.App.3d 622, 425 N.E.2d 1201 (1981), officer made obscene remark about department;

9. *Fortuno v. Police Board of City of Chicago*, 38 Ill.App.3d 950, 349 N.E.2d 521 (1976), officer violated department rules by not carrying regulation weapon.

Based upon the above, Illinois tenured and non-tenured police officers can be disciplined for a variety of reasons,

whether those disciplinary actions involve violations of Illinois statutes, police department rules, regulations and policies.

Consequently, the Uniform Peace Officers' Disciplinary Act provides substantive criteria analogous to *Fleury v. Clayton*, irrespective of its failure to state specific acts of conduct for which a police officer can be disciplined from the standpoint that, like *Fleury*, it restricts the discretion of the interrogators.

Whenever discretion is restrained, such restraining creates a substantive property right. *Scott v. Village of Kewaskum*, 786 F.2d 338 (7th Cir. 1986).

Because the respondents, herein, have no discretion in deciding the manner in which to conduct an interrogation for the purpose of filing charges of misconduct, nor do they have discretion regarding whether to admit evidence obtained in violation of the Act in a disciplinary hearing, as stated in Sections 2555, 2560, 2561, and 2563, of the Act; viewed functionally, the Act provides substantive property rights. *Reed v. Village of Shorewood*, 704 F.2d 943, 948 (7th Cir. 1983).

In the *Reed* decision, the court states: "[V]iewed functionally, property is what is securely . . . yours under . . . law, as distinct from what you hold subject to so many conditions as to make your interest meager, transitory or uncertain." *Id.*, citing *Reed v. Village of Shorewood.*

As a result, the above quotation from *Reed v. Village of Shorewood*, 704 F.2d 943, 948 (7th Cir. 1983), creates a legitimate claim of entitlement. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1970).

As *Perry v. Sindermann*, 408 U.S. 593, 601 (1972), holds, "rules or mutually explicit understandings that support [the plaintiff's] claim of entitlement to a benefit [and which he or she] may invoke at a hearing" are legitimate.

Pursuant to *Perry v. Sindermann*, the Act is a mutually explicit understanding within the meaning of that decision; the statute provides various rules governing when charges of misconduct may be brought and also provides rules governing the admissibility of certain evidence derived from internal police department interrogations.

Therefore, petitioner had a substantive property right in being protected against written charges of misconduct derived from admissions in violation of the Act's provisions, thereby resulting in violation of the concept of property rights as protected under the due process clause of the Fourteenth Amendment of the United States Constitution.

CONCLUSION

For reasons enumerated herein, the Writ should be granted.

Respectfully submitted,

STANLEY H. JAKALA
3219 South Maple Avenue
Berwyn, Illinois 60402
(312) 788-5733

Attorney for Petitioner

APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-3362

JOAN LYNN CAIN,

Plaintiff-Appellant,

v.

BRUCE E. LARSON, Police Chief of the Village of Herscher, Illinois, Police Department, DANIEL SUESS, Mayor of the Village of Herscher, Illinois, and President of the Village of Herscher, Illinois Police Board, ARTHUR BROCKSMITH, EARL DATWEILER, JAMES FELLER, STEVE JACOB, MERLE HENDRIX, and ROBERT MITCHELL, Individually and as Trustees of the Village of Herscher, Illinois, Board,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 1015—**John F. Grady,** *Judge.*

ARGUED APRIL 21, 1989—DECIDED JULY 7, 1989

Before CUDAHY, COFFEY, and MANION, *Circuit Judges.*

CUDAHY, *Circuit Judge.* Cain, previously a probationary police officer for the Village of Herscher ("Herscher"), alleges that her former employer violated her fourteenth amendment procedural due process rights. She is suing for compensatory and punitive damages and costs pursuant to

42 U.S.C. section 1983. The district court granted defendants' motion to dismiss and Cain appeals. Because the plaintiff has not alleged a constitutionally-protected property interest, we affirm.

I.

We review the dismissal of a complaint, and accordingly take all well-pleaded facts as true. *Conley v. Gibson*, 355 U.S. 41 (1957); *Rankow v. First Chicago Corp.*, 870 F.2d 356 (7th Cir. 1988). Cain's complaint alleges that, while she was employed by the Herscher Police Department, Bruce Larson (Chief of the Herscher Police Department), with the support of Daniel Suess (Mayor and President of the Herscher Police Board), had demanded that she work twenty hours of overtime per week without compensation. Cain claims that this demand, which she eventually refused, put a strain on her relationship with Larson. She was subsequently required to work five hours overtime per week.

Cain had previously informed Larson and Suess of difficulties she was having with one Daniel Diamond, who allegedly had a history of more than 125 arrests and more than 70 convictions (including two felony convictions). Diamond had been making phone calls and sending letters to Cain in which he threatened to harm or kill her. These threats had in part been responsible for an earlier decision by Cain to resign from the police department of another village where she had been employed. When Diamond at one point actually appeared in person at her former place of employment and at her residence, Cain had had him arrested and he received a 120-day sentence. After Cain moved and began work in Herscher, Diamond discovered her new whereabouts and began to harass her once more. On March 13, 1987, Diamond was arrested for public intoxication by the Kankakee County Sheriff's Department. Cain was apparently involved in the arrest, although the nature of her involvement is unclear from the complaint.

Following the arrest (from March 14 through 21, and again on March 23), Police Chief Larson interrogated Cain daily, without advising her that she was under investigation. Cain claims that these investigations furnished the basis for disciplinary charges subsequently filed against her by the Police Board. The disciplinary complaint read as follows:

> A. CRIMINAL CHARGES:
>
> On March 13, 1987, it is alleged that Joan Lynn Cain committed the acts of official misconduct, battery, disorderly conduct, and assault or intimidation, while effecting the arrest of one Daniel D. Diamond, at approximately 12:10 P.M. in the Village of Herscher, Illinois.
>
> B. UNETHICAL CONDUCT BY A POLICE OFFICER:
>
> Prior to and on March 13, 1987, Joan Lynn Cain advised her superior officer, members of the Illinois State Police, and members of the Kankakee County State's Attorney's office that the said Daniel D. Diamond made threatening telephone calls and mailed threatening letters, which allegations Sergeant Cain has failed to substantiate.
>
> C. POOR WORK QUALITY (SUBSTANDARD) WORK HABITS:
>
> Joan Lynn Cain's superior has documented a lack of initiative, poor job performance and the exercise of poor judgment by Joan Lynn Cain since employment as a Village Police Officer.

Complaint at ¶ 21. Disciplinary hearings were then scheduled on April 2 and 14, 1987. Prior to the hearings, the Police Chief asked Cain to hand over the threatening letters she had received from Diamond; he then refused to return them when asked by Cain's attorney, who was preparing her defense for the hearings. Cain further complains that during the hearings Larson improperly introduced hearsay evidence and failed to substantiate charges

(charges that he also allegedly failed to thoroughly investigate before the hearings). At the close of Larson's testimony at the hearings, the prosecutor agreed to dismiss the charges pertaining to "poor work quality," but retained the other charges. Cain resigned before the end of the hearings as a result of "the falsity of the charges and the denials of due process" that were occurring. Complaint at ¶ 39.

II.

Cain's complaint alleges that Larson's interrogation prior to the hearings, in combination with the subsequent hearings, violated due process rights secured to her by the Illinois "Uniform Peace Officers' Disciplinary Act" (the "Act"), the relevant sections of which provide:

> ¶ 2555. . . . No officer shall be subjected to interrogation without first being informed in writing of the nature of the investigation. If an administrative proceeding is instituted, the officer shall be informed beforehand of the names of all complainants. The information shall be sufficient as to reasonably apprise the officer of the nature of the investigation.
>
> ¶ 2560. . . . A complete record of any interrogation shall be made, and a complete transcript or copy shall be made available to the officer under investigation without charge and without undue delay.
>
> ¶ 2561. . . . No officer shall be interrogated without first being advised in writing that admissions made in the course of the interrogation may be used as evidence of misconduct or as the basis for charges seeking suspension, removal, or discharge; and without first being advised in writing that he or she has the right to counsel of his or her choosing who may be present to advise him or her at any stage of any interrogation.
>
> ¶ 2563. . . . Admissions or confessions obtained during the course of any interrogation not conducted in

> accordance with this Act may not be utilized in any subsequent disciplinary proceeding against the officer.

Ill. Rev. Stat. Ch. 85 ¶¶ 2555, 2560, 2561. Cain contends that these provisions create a property right, for probationary and non-probationary officers alike, in a "blemish-free" employment record.

It is by now well-established that in order to demonstrate a property interest worthy of protection under the fourteenth amendment's due process clause, a party may not simply rely upon the procedural guarantees of state law or local ordinance. *Bishop v. Wood*, 426 U.S. 341, 345-47 (1976); *Farmer v. Lane*, 864 F.2d 473, 478-80 (7th Cir. 1988); *Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 342 (7th Cir. 1987); *Gramenos v. Jewel Co., Inc.*, 797 F.2d 432, 434-35 (7th Cir. 1986); *Shango v. Jurich*, 681 F.2d 1091, 1100 (7th Cir. 1982). In order to give rise to a constitutionally-protected property interest, a statute or ordinance must go beyond mere procedural guarantees to provide some substantive criteria limiting the state's discretion—as can be found, for example, in a requirement that employees be fired only "for cause."[1] If a statute or regulation merely delimits what procedures must be followed before an employee is fired, then it does not contain the requisite substantive predicate. *Bishop*, 426 U.S.

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[1] A similar "substantive predicate" requirement has been applied in the context of claimed liberty rights. *Olim v. Wakinekona*, 461 U.S. 238, 248-51 (1983); *Hewitt v. Helms*, 459 U.S. 460, 471 (1983). Indeed, the Supreme Court's analysis of substantive predicates sufficient to create liberty interests has been quite analogous to its analysis of substantive predicates such as "for cause" requirements in cases involving property interests. *See Farmer v. Lane*, 864 F.2d 473, 479 n.4 (7th Cir. 1988). However, the analogy should be pursued with caution, for the Court's approach to liberty interests has been somewhat broader than its analysis of property interests. *See Hewitt*, 459 U.S. at 466-67; *Ingraham v. Wright*, 430 U.S. 651, 672-74 (1977); *see also* Rubin, *Due Process and the Administrative State*, 72 Cal. L. Rev. 1044, 1076-78 (1984). Cain does not invoke a liberty interest in continued employment or reputation, and so we do not reach that issue.

at 347 (no property interest where "employee is merely given certain procedural rights"); *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972) (no property interest in renewed contract where no provision for "contract renewal absent 'sufficient cause' "); *see also Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11 (1977) (property interest in continued service because public utility may not terminate service "at will" but "may terminate service only 'for cause' ").

Cain relies heavily upon a recent Seventh Circuit case, *Fleury v. Clayton*, 847 F.2d 1229 (7th Cir. 1988), in her argument that more than mere procedural protections are at issue here. *Fleury* involved an Illinois statute regulating the manner in which physicians may be disciplined. Specifically, the statute provided that the Illinois Department of Registration and Education could take disciplinary action, such as revoking or suspending physicians' licenses, upon a number of grounds, including "gross or repeated malpractice," "unethical or unprofessional conduct," and "professional incompetence as manifested by poor standards of care." Ill. Rev. Stat. ch. 111 ¶ 4433. This court held that the statute had created a property interest in "a blemish-free license to practice medicine." *Fleury*, 847 F.2d at 1232.

Cain argues by analogy that the protections provided by the Uniform Peace Officers' Disciplinary Act create a property interest in a "blemish-free" employment history for police officers at all levels. The problem with this contention is that none of the provisions to which Cain points provide the kind of substantive guidelines found in the statute in *Fleury*. The Act does not specify that officers may be disciplined only if they engage in certain kinds of conduct. Rather, it requires that, *if* officers are to be disciplined, certain procedures must be followed.

There is one substantive provision in the Act, which prohibits retaliatory actions:

> No officer shall be discharged, disciplined, demoted, denied promotion or seniority, transferred, reassigned

> or otherwise discriminated against in regard to his or her employment, or be threatened with such treatment as retaliation for or by reason of his or her exercise of the rights granted by this Act.

Ill. Rev. Stat. ch. 85 ¶ 2568. In this provision the Act goes beyond specifying procedures to be followed and provides a substantive guarantee—officers may not be discharged for engaging in a particular kind of conduct. However, Cain does not cite this provision, nor is there any evidence in the record to suggest that retaliation could have been an issue here; the actions of which Cain complains all occurred prior to her exercise of any rights guaranteed under the Act.[2] Thus the only applicable statutory provisions are procedural in nature, and Cain cannot rely on procedural guarantees in a state statute to assert a constitutionally-protected property interest.

III.

Because the state statutory provisions upon which Cain relies grant only procedural and not substantive rights, she has failed to assert a constitutionally-protected interest sufficient to invoke the protection of the due process clause. The judgment of the district court is

AFFIRMED.

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[2] Further, Cain never reached the point of being "discharged, disciplined, demoted, denied promotion . . . or otherwise discriminated against," because she herself resigned. Of course, if we were confronted with a case in which an officer had been so harassed in retaliation for her exercise of rights secured under the Act that she resigned, then it would be possible to make a "constructive discharge" argument. No such argument has been presented to us. Cain is essentially complaining that the conduct which violated the Act was carried out as punishment for her refusal to work overtime, not that some further retaliatory action was taken because she attempted to assert her rights under the Act. If retaliation were at issue, Cain might also be able to avail herself of the protections guaranteed by the first amendment.

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 7, 1989.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

JOAN LYNN CAIN,

Plaintiff-Appellant,

No. 88-3362 vs.

BRUCE E. LARSON, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 1015—Judge **John F. Grady.**

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX B

[DATED NOVEMBER 7, 1988]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 88 C 1015

JOAN LYNN CAIN,

Plaintiff,

v.

BRUCE E. LARSON, etc., et al.,

Defendants.

MEMORANDUM OPINION

This case comes before us on the defendants' motion to dismiss the plaintiff's complaint for failure to state a claim on which relief can be granted. We grant the motion.

FACTS

For purposes of this motion, the allegations of the complaint must be taken as true. The plaintiff alleges the following facts:

The plaintiff was originally a patrol officer for the Village of Steger, Illinois. During the course of her employment at Steger, she was harassed by a Daniel D. Diamond

("Diamond"). Specifically, Diamond made threatening telephone calls, harassed her at her residence and at the police department, and, in two separate conversations noted in police records, threatened to tie her up and violate her with barbed wire. Plaintiff alleges that she resigned from her position at Steger to avoid further contact with Diamond.

The Village of Herscher, Illinois subsequently hired plaintiff as a police sergeant. During the course of her employment at Herscher, the plaintiff encountered a number of difficulties. First, defendant Bruce E. Larson ("Larson"), the Chief of Police, with the knowledge and consent of defendant Daniel Suess ("Suess"), Mayor and President of Herscher, ordered her to work twenty hours a week overtime without compensation. When she objected, Larson changed the order and required her to work five hours a week overtime, again without compensation.

On March 13, 1987, plaintiff took part in an arrest of Diamond. Prior to the arrest, Diamond had discovered plaintiff's new location and had begun the harassment anew. Following the arrest, Larson questioned plaintiff on nine separate occasions concerning the arrest. He requested her to hand over to his custody all correspondence she had received from Diamond. During these questioning sessions, plaintiff was not represented by counsel and Larson did not inform her that he was conducting an investigation into her participation in Diamond's arrest. Further, he did not advise her in writing that admissions made in the course of the interrogation could be used as evidence against her in subsequent disciplinary proceedings.

Subsequently, Larson signed a disciplinary complaint against the plaintiff. The complaint was in three counts. The first accused her of "official misconduct, battery, disorderly conduct and assault or intimidation" while she was effecting the arrest of Diamond. First Amended Complaint at ¶ 20. Second, the complaint alleged that the plaintiff acted unethically by making unsubstantiated allegations that Diamond had made threatening phone calls and written threatening letters. The final count alleged "poor work

quality" and poor work habits. *Id.* This count was eventually withdrawn at the hearing.

Prior to the hearing, Larson failed to return Diamond's correspondence when requested to do so by the plaintiff's attorney, thereby preventing introduction of the correspondence in plaintiff's defense.

Plaintiff contends that Larson knew of the plaintiff's fear of harassment from Diamond and nonetheless failed to conduct a thorough investigation into his activities. Plaintiff alleges that such an investigation would have exculpated her with regard to the unethical conduct charges.

At the hearing, presided over by the trustees of the Village of Herscher, who are also named defendants in this action, reports made by deputy sheriffs of Kankakee were read into the record in spite of plaintiff's attorney's argument that they were hearsay. The plaintiff resigned prior to the conclusion of the disciplinary hearing.

The plaintiff claims that her due process rights under the Fourteenth Amendment to the United States Constitution were violated. Specifically, she claims that Larson and Suess acted with intentional and malicious disregard of her due process rights by punishing her for objecting to overtime without compensation, by falsifying a complaint, by failing to produce necessary discovery, and by admitting hearsay evidence over her counsel's objections. Plaintiff alleges that defendants' coercive actions forced her to resign.

The plaintiff claims that she is physically and mentally distraught and is currently being treated for post-traumatic stress disorder. She is seeking compensatory damages of $50,000.00 and punitive damages in the sum of $250,000.00.

DISCUSSION

Plaintiff alleges that she is entitled to a remedy under 42 U.S.C. § 1983 because the defendants, while acting under color of state law, deprived her of a constitutionally

protected property right without due process of law. Specifically, the plaintiff alleges that she was deprived of her property right to the protections of the Uniform Peace Officers' Disciplinary Act, Ill. Rev. Stat. ch. 85, ¶ 2551 *et seq.* (the "Act").[1]

For the plaintiff's claim to reach constitutional magnitude and be cognizable under Section 1983, she must allege, and prove, that defendants acted under color of state law; that defendants' actions deprived her of constitutional-

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[1] Relevant portions of the Act are as follows:

§ 3.2. No officer shall be subjected to interrogation without first being informed in writing of the nature of the investigation. . . .

. . . .

§ 3.7. A complete record of any interrogation shall be made, and a complete transcript or copy shall be made available to the officer under investigation without charge and without undue delay. . . .

. . . .

§ 3.8. No officer shall be interrogated without first being advised in writing that admissions made in the course of the interrogation may be used as evidence of misconduct or as the basis for charges seeking suspension, removal, or discharge; and without first being advised in writing that he or she has the right to counsel of his or her choosing who may be present to advise him or her at any stage of any interrogation.

. . . .

§ 3.9. The officer under investigation shall have the right to be represented by counsel of his or her choosing and may request counsel at any time before or during interrogation. When such request for counsel is made, no interrogation shall proceed until reasonable time and opportunity are provided the officer to obtain counsel.

. . . .

§ 3.10. Admissions or confessions obtained during the course of any interrogation not conducted in accordance with this Act may not be utilized in any subsequent disciplinary proceeding against the officer.

Ill. Rev. Stat. ch. 85, ¶¶ 2555, 2560-63.

ly protected rights; and that the deprivation occurred without due process of law. *Parratt v. Taylor*, 451 U.S. 527, 536-37 (1981). Defendants do not dispute that they acted under state law, and therefore we proceed to the two other parts of the test.

Property Interest Claim

Since *Goldberg v. Kelly*, 397 U.S. 254 (1970), the method for analyzing a claim that the state took away property without due process has been two staged: identifying the existence of a constitutionally protected property interest and then assessing the appropriate measure of procedural due process. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975). If the aggrieved party is determined to have no protected property interest, the procedural element of the Due Process Clause does not apply. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Property interests do not have their genesis in the Constitution. Rather, they are "created and their dimensions are defined by existing rules that stem from an independent source such as state law—rule or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577.

Curiously, the plaintiff does not allege a property interest in her employment; she alleges instead that her property interest arose out of procedures laid down in the Act. The Seventh Circuit has repeatedly observed that the mere existence of procedural guarantees, without more, does not create any substantive property interest and that mere failure to adhere to the procedure does not constitute a deprivation of constitutional magnitude. A plaintiff must first identify a substantive property interest before he or she can demand procedural due process protection for that interest. *Shango v. Jurich*, 681 F. 2d 1091, 1100-01 (7th Cir. 1982). As the court noted in *Lyznicki v. Board of Education, School District 167, Cook County*, 707 F.2d 949 (1983):

> A mere right to notice and a hearing, which places no more constraint on the employer's freedom of action than is inherent in having to confront the employee in a public forum, does not change the essential character of the employment relationship as one of employment at will; it does not convert it into a form of tenure employment and thus create a Fourteenth Amendment property right.

Id. at 952.

Similarly, in *Endicott v. Huddleston*, 644 F.2d 1208 (7th Cir. 1980), the court rejected the plaintiff's argument that his right to a public hearing on the question of whether or not he should be reappointed entitled him to continued employment:

> The right to a public hearing provided by Illinois law is not itself a property interest under the Fourteenth Amendment. Not every interest accorded by state law is a "property" interest within the Amendment's meaning. The Fourteenth Amendment does not constitutionalize the violation of every right granted by state laws, but instead only those . . . which [deprive] a person of some right secured by the Constitution or laws of the United States. *Paul v. Davis*, 424 U.S. 693, 700, 96 S. Ct. 1155, 1160, 47 L.Ed.2d 405 (1976).

Id. at 1214 (citation omitted).

The plaintiff does not point to a significant substantive restriction on the defendants' decision-making power. The Act grants certain procedural rights to Illinois law enforcement officers in matters involving disciplinary proceedings. However, these procedural guarantees do not significantly limit the trustees' discretion in making decisions to fine, suspend, or discharge officers. Because the procedures impose no significant restriction on the discretion of the decision-maker, they do not establish a constitutionally protected property interest.

CONCLUSION

We grant the defendants' motion to dismiss. Because it does not appear that plaintiff can cure the deficiency in the complaint by amendment, the dismissal is with prejudice.

DATED: NOV 7, 1988

ENTER: /s/ John F. Grady
United States District Judge